No. 78-159

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM 1977

ANDREW B. CARSELLO,

Petitioner.

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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ANDREW B. CARSELLO,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Now comes Petitioner, Andrew B. Carsello, and prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit, affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois, Eastern Division, adjudging him GUILTY and sentencing him to serve time in the penitentiary.

JUDGMENT AND OPINION BELOW

The opinion of the court below, as yet unreported, is appended hereto (App. A) per Rule 23.1(a).

JURISDICTION OF THIS COURT

The judgment sought to be reviewed was entered June 30, 1978.

No petition for rehearing having been filed, this Petition is timely filed (per Rule 22.2) within 30 days therefrom. Per Rule 23.1(b), jurisdiction is invoked pursuant to 28 U.S.C. 1254.

QUESTIONS PRESENTED FOR REVIEW:

(1)

Were petitioner's Fourth Amendment rights violated by the in-court use against him (in a United States District Court) of evidence obtained as a result of an admittedly unconstitutional search, where State officers conducted the initial search and then turned over to federal authorities judicially suppressed material which gave rise to the charges of which petitioner stands convicted?

(2)

Does not this case uniquely present itself as a vehicle for this Court to speak on the principles applicable to the "*Ceccolini*"-type situation, 98 S.Ct. 1054 (1978), in the context where tangible evidence, *not* live-witness in-court testimony, is the object of suppression?

CONSTITUTIONAL PROVISIONS AND STATUTES* INVOLVED

The Fourth Amendment to the Constitution of the United States of America reads:

> The right of the people
> to be secure
> in their persons, houses, papers, and effects,
> against unreasonable searches and seizures,
> shall not be violated,
> and no Warrants shall issue,
> but upon probable cause,
> supported by Oath or affirmation,
> and particularly describing the place to be searched,
> and the persons or things to be seized.
>
> • • •
>
> WE INVOKE THE FOURTH AMENDMENT.✦

STATEMENT OF THE CASE

Petitioner, Andrew B. Carsello (hereinafter, defendant) was charged in a seven-count indictment (76 CR 824) with income tax violations [knowingly having filed false returns, in violation of 26 U.S.C. 7206(1)] for each of four tax years (Counts 1 through 4), and with three specific alleged violations of 18 U.S.C. 1510 (Counts 5, 6 and 7), for allegedly having endeavored, by means of misrepresentation, to

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* The precise statute for violation of which petitioner faces penitentiary time is 26 U.S.C. 7206(1), filing false income tax returns. No questions are presented *re* statutory construction or interpretation.

✦ This Petition, come what may, is devoted to Free Spirits everywhere, a very few of whom are hereinafter acknowledged. (And see App. 18, fn. 5; App. 20, fn.†; App. 27, fn. 16.)

obstruct various individuals from communicating information to federal agents in the course of an investigation.

Defendant's Motion to Suppress tangible evidence (R. 26)** was allowed, but his motion to suppress all leads emanating from the said suppressed evidence was denied. (R. 47)

Upon evidence at his bench trial, the court found defendant guilty of the income tax violations as charged in Counts 2, 3 and 4, and discharged him upon the remaining counts. (R. 46)

The court sentenced him to concurrent 18 months sentences.

Statement of Facts

The government stipulated that *because of the arrest* and seizure of documents in defendant's residence—ruled unconstitutional by the District Court, which suppressed the actual documents seized—agents obtained defendant's tax returns, and *the* **criminal** *tax investigation began* which resulted in the instant prosecution.

The original search was deemed unconstitutional because the items seized by local police in defendant's home—personal, financial records—were beyond the scope of the local gambling warrant then being executed, and because the material seized was neither obviously incriminating nor admissible within any recognized exception to the warrant requirement. (See further discussion of the underlying facts, and in the *Preface*, pp. 7-8, *infra*.)

** *Legend*

R. = Record on Appeal in No. 77-1979.

App. A = Appendix A, to this Petition, the Court of Appeals' as-yet-unreported opinion in No. 77-1979.

App. B = Appendix B to this Petition, excerpts from our Brief and Reply Brief below in No. 77-1979.

The unreported income for which defendant stands convicted was alleged to have come from his *legitimate* business enterprises, **not** from any so-called "gambling" or any other illegal venture.

The court overruled defendant's motion to suppress use of the resultant leads and evidence, and found defendant guilty as charged upon Counts 2, 3 and 4. (R. 46) Gov't ex. 1 through 56, a series of checks, thus were admitted in evidence. *Without them, defendant could not have been convicted.* (See R. 37.)

• • •

The chain of events following seizure of the suppressed records is:

On the papers seized by State officers and later turned over to the government—which papers themselves the District Court had ordered suppressed—was the name, "Joe." Impelled by nothing other than this, IRS agents visited "Joe," who told them he was an employee of Grand Sanitation Company (hereinafter, Grand), the defendant's company. "Joe" supplied the IRS with a list of 35 names of customers of Grand, one of which was Brighton Co. Coincidentally, IRS was investigating Brighton Co., and possessed certain checks from Brighton. Notations thereon indicating where some of these were cashed led the IRS to a particular currency exchange. From the currency exchange, IRS agents obtained an additional list of Grand's customers. Going now to the customers themselves, IRS got originals of certain checks paid to Grand, allegedly representing specific items of income which defendant allegedly failed to report on his federal income tax returns for the appropriate tax years.

* * *

(A slightly different slant on these same facts may be gleaned from reading the opinion below; see App. 3-4.)

REASONS FOR GRANTING THE WRIT***

INTRODUCTION

Gradual encroachments upon the liberty of free men must ever be guarded against; the most vigilant sometimes forget:

There, but for Grace, goes my brother . . . .

• • •

We dare not say what happened to our client, the defendant, could happen to any of Your Honors[1] . . . *but*: We ask the Justices, just this once, to imagine—Could you, perhaps, place your own brother, uncle, cousin, or grandfather, in the shoes of *this* defendant, just for the sake of the argument . . . . ?

• • •

They build a wall around us and we thank them for the shade, 'til suddenly, we're living in "a world . . . [we] never made"[2] . . .

• • •

[1] After all, guilt of a crime is not here contested; *only the means* to that end are in issue. Contemplate, if you will, prior historical uses of that old maxim, "The end justifies the means." . . .

[2] "I, a stranger and afraid,
In a world I never made."

From *Last Poems* by A. E. HOUSMAN; See frontispiece to FARRELL, JAMES T. (auth. STUDS LONIGAN, *inter alia*), A WORLD I NEVER MADE (Vanguard Press, Inc. 1936 [6th Printing]). And see CAMUS, THE STRANGER.

*** Please also see and consider *Addendum*, pp. 17-21, *infra*, incorporating a decision entered *after* this Petition was set in type.

We pray You take this case, so as to say, what the Fourth Amendment meant, and what it means today. Only you can "turn the tide . . ."[3]

(1)

Where State officers conducted an initial search (since ruled unconstitutional by the District Court) and turned over to federal authorities tangible material already judicially suppressed which gave rise both to the charges of which defendant now stands convicted, and to tangible evidence (used against him at his trial in a United States District Court) obtained as a result of the said illegal search, defendant's Fourth Amendment rights were violated.

The Constitution *can't* countenance **this** conviction.

• • •

(2)

This case uniquely presents itself as a "perfect" vehicle for this Court to speak on the principles enunciated in *United States* v. *Ceccolini*, 98 S.Ct. 1054 (1978), in the context where tangible evidence, *not* live-witness in-court testimony, is the object of suppression.

• • •

Preface

Armed with a warrant aimed solely at evidence of State gambling law violations, State officers searched defenddant's residence. Finding no evidence of gambling as described in the warrant, the officers seized personal financial records which were then turned over to federal authorities. The District Court ruled the search unconstitutional. Lest the government attempt to argue that affirmance may be based upon any asserted impropriety of this initial ruling,

[3] If, as you read this, you hear a knock at the door, tomorrow may be already here. . . . *May this* **not** *come to pass!* **This** *time*. . .

this preface should suffice to lay any such argument to an early rest, so the real issue may be confronted, *viz.*, whether, assuming the unconstitutionality of the initial search, the resultant evidence, too, had to be suppressed as a "tainted fruit" of the poisonous tree.

The District Court agreed with defendant below that the tangible items seized during execution of the search must be suppressed because they were not apparently incriminating when seized and were beyond the scope of the warrant's description. See *United States* v. *Gray*, 484 F.2d 32 (6 Cir. 1973).

• • •

Argument

Evidence seized in violation of defendant's Fourth Amendment rights is inadmissible against him. *Mapp* v. *Ohio*, 367 U.S. 643 (1961). Moreover, as here, evidence unconstitutionally seized by State officers is inadmissible in federal courts, even if federal officials may have had nothing to do with any initial official wrongdoing. *Elkins* v. *United States*, 364 U.S. 206 (1960). Likewise, evidence obtained as a direct result of the unconstitutional seizure of evidence—the "fruit of the poisonous tree"—is inadmissible against defendant. *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963).

On the facts here—where, concededly, *the illegally seized evidence* **alone** *gave rise to the investigation* from whence these charges sprang—there is just that sort of exploitation of the original illegality about which the Court **was** concerned in *Wong Sun*:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is '*whether*, granting establishment of the primary illegality, *the evidence* to which instant objection is made *has been come at by exploitation of that illegality* or instead by means sufficiently distinguishable to be purged of the primary taint.' . . . We think it clear that the narcotics were **'come at by the exploitation of that illegality'** and hence that they may not be used against [defendant]." *Id.* at 487-88. (Emphases added.)

In view of the government's commendably candid concession, the issue is whether the evidence we claim should have been suppressed—the entire results of the IRS investigation—is the suppressible "fruit of the poisonous tree," or, in the alternative, whether the taint was attentuated and the evidence properly admissible.[4]

• • •

This case bears review by this Court, because the *Carsello* case portends what the lower federal courts will do in interpreting *Ceccolini*—even where, as here, tangible evidence, *not* in-court live-witness testimony, is at stake. Look at this:

Derivative (rather than direct) use alone cannot *prima facie* remove the taint. See language of Mr. Justice Frankfurter, for the Court, in *Nardone* v. *United States*, 308 U.S. 338, 341 (1939), quoted in *Ceccolini*, *supra*. **To pare a phrase**: "One step removed" does not necessarily equal "cleansed."

In *Ceccolini*, a majority of Your Honors reaffirmed *Wong Sun's*[5] holding that "verbal evidence which derives

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[4] See *Addendum*, pp. 19-21. Extended Fourth Amendment historical analysis is included in App. B hereto, *infra*, excerpted from our Brief below. See especially App. pp. 23-24 *re* the deterrence aspect of the balancing test as applied to this case.

[5] *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

so immediately from . . . [unconstitutional conduct] is no less the 'fruit' of official illegality than the more commonplace tangible fruits of the unwarranted intrusion.'"[6]

In *Ceccolini*, You said:

> "[t]he Court of Appeals was simply wrong in concluding that if the road were interrupted, its length was immaterial. Its length we hold, *is* material . . . ."[7]

See how short the road was here, when you get right down to it. (See Facts, *supra*.)

In *Ceccolini*, You said:

> "In short, since the cost of excluding live-witness testimony often will be greater, a closer, more direct link between the [official] illegality and that kind of testimony is required."[8]

Here, You can decide a cause involving tangible evidence as was *not* the case in *Ceccolini*, elucidating the ramifications of your *Ceccolini* holding[9] in the physical-evidence context.

The Fourth Amendment: Hanging in the Balance

The Seventh Circuit panel's restrained discussion of directions, emphasis and bent, as it were, in recent Supreme Court decisions illuminates that no such case governs here. *Not one* is a federal criminal case dealing with the delicate philosophical and functional framework and balance be-

[6] *Ceccolini, supra.*

[7] *Ibid.*

[8] *Ibid.*

[9] Dissenting Justices, please note . . . *Ceccolini*, not involving tangible evidence, is not dispositive, as the Seventh Circuit also realized. See App. 9, fn. 3. Nor does *Ceccolini* necessarily compel *Scios*, as the *en banc* D.C. Circuit Court realized as well. See *Addendum*, 17, *infra*.

tween two sovereigns.[10] We speak, of course, of the relations betwixt the federal and local governments, where the clean-handed federals are given "pay dirt" by the locals, who, per judicial fiat, can not use it.

This balance throws off kilter the springs of *any* balance-test which (arguably) otherwise might apply. (See pp. App. 22-24.)

Each and every "balancing-test" case where the balance *might* seem to swing against us sets the stage to prove our point.[11]

[10] See our discussion, App. 21-25. While the cases cited against us speak of a less-than-complete exclusionary rule, the facts involved in each illustrate that none controls. *United States* v. *Calandra*, 414 U.S. 338 (1978), involved the *sui generis* of grand jury proceedings; *United States* v. *Janis*, 428 U.S. 433 (1976), admissibility in a federal *civil* suit of evidence illegally seized by a State officer; *Stone* v. *Powell*, 428 U.S. 465 (1976), extent to which Fourth Amendment claims fairly litigated in State court may be relitigated via federal habeas corpus under 28 U.S.C. 2254; *United States* v. *Peltier*, 422 U.S. 531 (1975), an exclusionary-rule retroactivity question; *Michigan* v. *Tucker*, 417 U.S. 433 (1974), involving a delicate retroactivity question bearing upon the effect of a change in the law upon the officers' pre-change conduct, is fully distinguished in our original Brief, pp. 11-12, reproduced as App. 16, *infra; Desist* v. *United States*, 394 U.S. 244 (1969), likewise, dealing with a retroactivity issue, again hinging upon the officers having followed the pre-existing law.

Though each of the cited cases declines to apply the exclusionary rule, the context of each gravely differs from that at bar.

See p. App. 18, esp. fn. 6.

[11] Cases involving two sovereigns in such materially different aspects as to be inapplicable, are those most strongly relied upon by the government. *United States* v. *Paepke*, 550 F.2d 385 (7 Cir. 1977), wholly was harmonized with reversal of Carsello's conviction in our Original Brief. (See App. 21) The intervening active conduct by

(footnote continued)

The alleged intervening "volition", here, on the facts, was strictly *pro forma*. Once the tainted evidence "gave" "Joe" to the authorities, the stench was entrenched.[12]

Justice Will Out:

No rhetoric can mask what really happened here.

The government postulates that the evidence at issue would have been obtained "inevitably" regardless of the initial seizure; that it was obtained, in the end, by means sufficiently removed therefrom to be admissible under the current vogue of a "balancing test."

Even per the government, the balancing test (which we decry, yet can apply[13]) is phrased thus: The evidence is admissible,

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(footnote continued)
Paepke parallels similar active conduct by the losing defendants in *United States* v. *Raferty*, 534 F.2d 854 (9 Cir. 1976), and *United States* v. *Turk*, 526 F.2d 654 (5 Cir. 1976). The doctrine of such cases—that a defendant may not commit post-seizure offenses with impunity, hiding behind the illegal seizure to immunize his new crimes—is no different from that permitting statements violative of the Fifth Amendment to be used against their maker if he later commits perjury concerning them. See *Harris* v. *New York*, 401 U.S. 222 (1971). Does this justify *any* infringement upon the privilege against self-incrimination, absent the carefully limited "new crime" factual situation? Of course not. The same goes here.

[12] As to "intervening" and "casuality," see cases cited in App. B, 12-13; none is meaningfully distinguished. *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890 (7 Cir. 1976), conspicuously is ignored.

[13] See our original Brief, pp. 17-21, App. B. pp. 21-25, *infra*, where we demonstrate that even if a balancing approach must be applied, the evidence should have been excluded here. See also *Addendum*, p. 17, *infra*, esp. pp. 19-21.

> "where exclusion would have a minimal deterrent effect on police misconduct and where exclusion would frustrate significant public interests." (G. Br. p. 10)[14]

Deterrence must needs be aimed at the future conduct of others; yet the Court here can see no further than the *ex post facto* conduct of the officers here involved. (See App. 10.)

If the initial taking of his private records from defendant's home (rightly held unconstitutional though under cover of a warrant[15]) may be deemed undertaken in "good faith,"[16] it was nonetheless unconstitutional and illegal. Good faith *ab initio* notwithstanding (*arguendo*), no conceivable argument rends innocuous the turning over to *federal authorities* of the material *by the locals*.[17]

That is the conduct which must be deterred. The *turnover*.

Once they flouted a local suppression order, once the locals passed their bitter fruits to the federales, the authorities made up their bed; let them lie in it.

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[14] In making this statement, the government relies on a series of Supreme Court cases wherein evidence was held admissible, but in circumstances so different from here as to be inapplicable. See footnote 10, *supra*, where we have distinguished all these cases.

[15] See Preface, pp. 7-8, *supra*, and App. 24, *infra*.

[16] See App. 10.

[17] To the extent that the trial court relied upon the protective mantle of the warrant as demonstrative that the violation was "not serious," a "good faith" mistake, we refer your Honors to our original Brief, App. B, in particular, pp. App. 22-26. (Also, pp. 19-21, *infra*.)
If a warrant can sanitize what's done in its name, whilst the same without warrant be condemned, we're lost! Don't let the Fourth Amendment pervert our forebears' purpose. (See p. 21, *infra*, and App. B, p. 24, *re* "deus ex machina".)

The inscrutable inevitable

It is no answer to say that the evidence "would" have been found anyway in the normal course of events. The fact remains; *that is not what happened.*[18]

To apply a strict "inevitability" test—in truth, a contradiction, as we see it, there being no hindsightly way to show that *anything* would have happened, if what actually happened, had not—is to jettison forever any notion of deterrence.

The Seventh Circuit chose not to rely on the so-called "inevitable discovery" rule.[19]

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[18] *United States ex rel. Owens* v. *Twomey*, 508 F.2d 858, 866 (7 Cir. 1974), may not properly be relied on as indeed *establishing* an "inevitability" doctrine in the Seventh Circuit, for the case itself involved a collateral attack on a State conviction, bringing slightly different standards into play. *Cf. Stone* v. *Powell*, 428 U.S. 465 (1976), cited in fn. 10, *supra*. In *Owens*, while the court inferentially relied upon an "inevitability" test in holding untainted and admissible the testimony of one, Marion Short,

> "Marion's identity was clearly established *prior* to the search, notwithstanding that her work address was subsequently obtained from the booklet seized during the search. . . . The *effective cause* of the police establishing the identity of Marion Short were these [pre-search] leads." 508 F.2d at 866. (Emphasis added.)

There are two gross differences between these facts and those at bar which render this case not subject to decision against defendant on any so-called "inevitability" basis: (1) in *Owens*, *pre*-search leads were the *effective* cause of discovering the evidence; and (2) in *Owens* a live person's live, in-court testimony, *not* solely physical evidence, was involved at trial.

[19] See App. p. 11.

"Ask not for whom the bell tolls . . ."[20]

'Tis said, only two things are "inevitable"—death and taxes.

Let not this tax case toll the death knell for the Fourth Amendment—

PENULTIMATUM

Opportunity Knocks

This case presents the vehicle to salvage or ravage the Fourth Amendment. Will You take it?

CONCLUSION[21]

For the foregoing reasons, we pray that a writ of certiorari be issued to review the judgment of the Court of Appeals for the Seventh Circuit, for the purpose of saving the Fourth Amendment.[22]

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
Attorneys for Petitioner

Completed 7/26/78.

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[20] Credit is due to the Bible and to Ernest Hemingway.

[21] Please also see and consider *Addendum* (pp. 17-21, *infra*), following this page, before the Appendices.

[22] And, incidentally, to relieve this 55-year old defendant of previously unblemished record from the onus of serving time in the penitentiary.

ADDENDUM

After this Petition was set in type, and just before filing, the District of Columbia Circuit's *en banc* decision was handed down in *United States* v. *Scios,* No. 75-1619, July 21, 1978. (See App. 13 & 26, *infra,* for our *earlier* discussion of *Scios* prior to the *en banc* ruling.)

The recent *en banc* decision reverses (5-4) the panel's decision; *i.e.,* evidence held admissible by the panel was excluded by the Court *en banc.*

The following discussion encompasses the *Scios* holding in relation to *Ceccolini,*[1] and reaffirms our analysis below with respect to the "underpinnings" of some earlier rulings utilized by the government and the lower courts herein adversely to defendant Carsello's position on the suppression issue.

• • •

The District Court's ruling in *Carsello* below heavily relied upon the now-overruled panel decision in *Scios;* likewise, the *Paepke* decision,[2] also relied on both by the trial court and by the Seventh Circuit,[3] was based in large part upon the *Scios* panel decision which has now been reversed by the *en banc* court.

• • •

Like *Ceccolini,* the *Scios* decision *en banc* perpetuates the live witness vs. immutable object distinction which we invoke as one of the reasons to reverse Carsello's conviction: for although so-called volitional acts of various persons may have come into play in obtaining the physical evidence

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[1] *United States* v. *Ceccolini,* 98 S.Ct. 1054, 55 L.Ed.2d 268 (1978).

[2] *United States* v. *Paepke,* 550 F.2d 375 (7 Cir. 1977).

[3] Like the trial court, App. 13 & 26, the Seventh Circuit panel expressly relied on *Paepke, supra.* See App. 10, *infra.* See also App. 13, 14 & 18, fn. 6.

utilized against Carsello here,[4] only tangible evidence was the object of the motion to suppress, and only tangible evidence is here in issue. *No live witness testimony is here sought to be suppressed.*

* * *

Scios draws a line between *true* volition and *coerced* volition, *viz.*:

> "It seems clear from *Wong Sun* that for an act of free will to operate as a dissipation of taint, it must occur in circumstances devoid of coercion." *Scios,* p. 8.

Thus, even though live witness testimony[5] is not *per se* involved in *Carsello,* the Seventh Circuit's analysis of attenuation and taint dissipation (see App. 10)—which involves the concept that volitional acts of various persons, mostly, Joe Francone, gave rise to the tangible evidence in issue being available to be used against Carsello—requires that volition here be discussed to a limited extent.

At bar, Joe Francone was not available (being deceased) at trialtime; hence the volitional or non-volitional nature of his "cooperation" never was explored below. We submit that since only *voluntary acts devoid of coercion*[6] can serve to dissipate an otherwise exclusion-necessitating taint, a silent record cannot suffice to support a ruling adverse to defendant Carsello in this case.

* * *

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[4] See App. 10, *re* "voluntary cooperation"; see also App. 3-4.

[5] The suppression of live witness testimony is, traditionally, judicially abhorred. See *Scios,* p. 12, and dissenting opinion of Judge Wilkey, referred to in *id.* p. 12, fn. 14. (Page references to the *en banc Scios* decision are to the as-yet-unreported slip opinion.)

[6] *Scios,* p. 8; see also *id.* at 9.

The truly voluntary "police science" student, Ms. Hennessey (Ceccolini's employee), clearly is contrasted with witness Massa's coerced testimonial role in *Scios.* See *id.* at 12-14.

The crux of the balance, we submit, culling the substance both from *Ceccolini* and from the post-*Ceccolini, Scios* decision, is simply this:

All else being equal, does the case to be decided involve law enforcement conduct which should be deterred, such that failure to suppress the use of the evidence in question might encourage future official illegality?

So, too, did the Seventh Circuit state it in *Carsello;* see the language set forth in the opinion, App. 10, *infra.*

* * *

The *Carsello* Court mis-perceived that the so-called "good faith" mistake by the local officers means there is no misconduct to be deterred. Yet in *Carsello,* as in *Scios,* "the search . . . was to gain evidence," see *Scios* at 14, in contrast to the inadvertent (initial) discovery of the evidence in *Ceccolini.*

We reproduce below an excerpt from our Brief in the Seventh Circuit, also contained within pp. App. 21-25, *infra,* adopted and incorporated herein by reference, containing our argument for the necessity of exclusion here for deterrent purposes, in keeping with the later-decided opinions in *Ceccolini* and *Scios.*

Excerpted from our Brief Below; contained within pp. App. 21-25, *infra.* (footnotes omitted)

. . . [C]ourts must *balance the value* of the deterrent purpose of excluding the evidence *against the cost* of excluding reliable, relevant evidence, which, in turn, sometimes prevents the "truth" from surfacing. . . .

In fact, what the local officers did here was to conduct a broad, general search, *under* **cover** of a warrant. **Assuming,** *arguendo,* that the warrant was procured in good faith, **still** the officers' conduct in seizing material neither covered by the warrant nor "outwardly incriminating" was no better than a fishing expedition. Finding nothing called for by

the warrant, and nothing coming to their attention which *appeared* to be illegal or contraband, the officers were *way* out of line when they seized defendant's private personal papers out of his home under the protective guise of the warrant.

Here, the local officers' conduct **should** *be deterred.* Taking a man's private papers from his home under these circumstances is odious enough to ring the bell on the moveable muck-meter; to make the "exclude it" sign light up . . . .

Even if this Court, here and now, holds that the conduct of *all* the federal agencies was proper, **admitting** *the evidence* **condones** *the conduct of the* **locals**.

In contemplating the deterrent effect of excluding illegally obtained evidence, Your Honors must think about deterring, not only the federal authorities, but also, the *local* police.

Allowing this evidence to be used against defendant [Carsello] upon these facts gives *carte blanche* to locals to get a facially valid search warrant, seize everything in sight when executing it . . .; and *then,* though a court ordered all defendant's purely personal papers returned to him, *the locals can get away with* presenting **the whole pile** to federal authorities in hopes something incriminating just might turn up.

What? A spot on the silver platter we thought was all rubbed out?

Permitting the use in the case against defendant Carsello of tangible evidence consisting of checks found by federal authorities as a direct result of the seizure of defendant's private papers by local police does, in practical effect and application, resurrect the silver platter doctrine in multi-sovereign attenuation cases. While little has been said about the local-federal interaction thus far, it can hardly be doubted that *this evidence would be suppressed*

if **all** *the activity* (search and seizure through and including investigation, evidence procurement, and use in court) *had been carried out by arms of a single sovereign.* Although the district court found that the government's action in subpoenaeing the records after their illegal seizure by locals was not improper in and of itself, the court quite properly has ruled the immediately-seized evidence inadmissible.

The difficulty, it appears, *lies in perceiving the* **identity** *of the class* whose future illegal conduct is *to be deterred.*

Here, now, the local authorities must be the target. And to the extent that the otherwise blameless federal authorities capitalized on ("exploited") the local officers' illegality, the federales become accountable for the locals' conduct —just as the government would argue, in a criminal trial, that a defendant's guilt is based on accountability.

If the fact that the local officers here procured a facially valid warrant before conducting a fishing expedition search can insulate their conduct from the sanction of excluding from a man's federal trial all evidence resulting from their unconstitutional seizure of his private papers, **then** the warrant requirement of the Fourth Amendment is *worse than meaningless;* it is the tool, no, the *deus ex machina* by incredible virtue of which the otherwise inadmissible evidence becomes purified. (End of Excerpt)

* * *

The foregoing discussion, presented as such to the Seventh Circuit panel, stands up in the light of the after-decided *Ceccolini* and *Scios* decisions. The distinctions drawn and crucial factors noted in those decisions strengthen our position at bar. (See also pp. 9-10, *supra.*)

Respectfully submitted,

JULIUS LUCIUS ECHELES
CAROLINE JAFFE
Attorneys for Petitioner

APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

No. 77-1979

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDREW B. CARSELLO,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 76 CR 824—THOMAS R. MCMILLEN, Judge.

ARGUED APRIL 4, 1978—DECIDED JUNE 30, 1978

Before FAIRCHILD, *Chief Judge,* BAUER, *Circuit Judge,* and VAN PELT, *Senior District Judge.**

BAUER, *Circuit Judge.* In a seven-count indictment returned July 8, 1976, defendant-appellant Carsello was charged with four violations of 26 U.S.C. §7206(1) for having filed false income tax returns, and with three violations of 18 U.S.C. § 1510 for having attempted to obstruct the course of a federal investigation. Counts 1 through 3 alleged that Carsello had failed to report a substantial amount of interest income for the 1970 through 1973 tax years. Counts 2 through 4 alleged the failure to report a substantial amount of gross income received by Carsello's wholly owned Grand Sanitation and Supply Company during the same tax years. Counts 5 through 7

* The Hon. Robert VanPelt, United States District Court for the District of Nebraska, is sitting by designation.

alleged that Carsello had interfered with the course of a federal investigation into tax and loan-sharking violations by attempting to obstruct the flow of information from three persons to federal agents.

Following the suppression of certain usury records illegally obtained from the defendant, the Government announced that it would offer no proof on Counts 1, 5 and 6 of the indictment, and would limit its proof of Counts 2 and 3 to the defendant's failure to report gross business receipts. Counts 1, 5 and 6 were thereupon dismissed by the district court. A bench trial of the remaining counts resulted in an acquittal on Count 7 and convictions on Counts 2 through 4. Carsello was then sentenced to concurrent terms of 18 months' imprisonment on the three tax fraud counts.

On appeal, Carsello argues that, in addition to suppressing the usury records illegally obtained from him, the district court also should have suppressed certain invoices and cancelled checks allegedly obtained by exploitation of information gleaned from the illegally seized usury records. In short, he argues that the cancelled checks and invoices used to prove his failure to report gross income from his legitimate business enterprise were the "fruit" of the illegal seizure of his usury records and therefore should have been suppressed under *Wong Sun* v. *United States*, 371 U.S. 471, 485 (1963). We disagree and affirm the district court's judgment for the reasons noted below.

I.

The facts relevant to the suppression issue before us are as follows: On March 5, 1975, Chicago police officers executed a search warrant at defendant's home that called for seizure of "records of wagers on horse races, scratch

sheets and other paraphernalia used, kept or provided for the illegal act of gambling." In the course of executing the warrant, the officers found nothing relevant to their gambling investigation, but did seize a set of records that appeared to reflect usurious transactions. Upon returning to the police station, the officers summoned agents of the Federal Bureau of Investigation and the Internal Revenue Service, who examined the books seized and determined that they were in fact usury records.

Subsequently, state charges of criminal usury were brought against Carsello, but later dismissed when the state court suppressed the usury records because they were outside the scope of the search warrant the Chicago police officers were executing at the time they seized the records.

Meanwhile, the Federal Bureau of Investigation was conducting its own investigation of possible extortionate credit transactions involving Carsello. From photocopies of the usury records made immediately after their seizure, the agents obtained a list of persons who may have been involved in usurious transactions with the defendant. Interviews with those persons, however, proved fruitless, and the investigation was terminated in September 1974 without any charges being filed against Carsello.

The Internal Revenue Service then began an active investigation to determine whether the defendant had failed to report interest income on his recent federal income tax returns. Carsello's returns were obtained internally by IRS agents, who then interviewed about six to eight persons whose names they had gleaned from the seized records. One of the persons interviewed was Joe Fran-

cone,[1] an employee of Grand Sanitation and Supply, who had asked for but been denied a loan by Carsello. Francone, however, did provide the interviewing agent with the names of 35 Grand Sanitation customers. One of those customers was the Brighton Construction Company, which was at the time itself the subject of a separate IRS investigation. The investigating agent then reviewed Brighton's cancelled checks, which were already in the possession of the IRS, and learned that Carsello had cashed checks from Brighton at two Chicago currency exchanges. The agent then visited the exchanges and obtained additional names of Grand Sanitation customers by reviewing checks cashed by Carsello at one of the exchanges. Now having a list of about 70 Grand Sanitation customers, the agent obtained all cancelled checks and invoices relating to their transactions, with Grand Sanitation. These cancelled checks and invoices, obtained from Grand Sanitation customers were instrumental in proving the defendant's failure to report gross business receipts, and it is the district court's refusal to suppress these records that Carsello contests here.[2]

II.

On appeal, Carsello argues that the cancelled checks and invoices received into evidence were the suppressible "fruit of the poisonous tree" because (1) the criminal tax

[1] Francone's name did not itself appear in the seized records, which listed him only as "Joe F." along with an address and telephone number. The address was incorrect, and the telephone number was no longer in service. However, the investigating agent learned that the outdated telephone number was listed under the name "Francone," and the agent was able to obtain a current address for Joe Francone by reviewing IRS records.

[2] The Government does not challenge on appeal the district court's suppression of Carsello's usury records.

fraud investigation leading to the defendant's arrest and conviction would not have been initiated but for the disclosure of the usury records illegally seized from him, and (2) because the Government actually made use of the information obtained from the illegally seized usury records in the course of its investigation. Accordingly, Carsello reasons that the evidence admitted at trial was "come at by exploitation" of the illegal seizure of the usury records. *Wong Sun* v. *United States*, 371 U.S. 471, 488 (1963).

The Government responds (1) that the causal connection between the evidence actually admitted at trial and the illegally seized usury records was so attentuated as to purge the former of any taint touching the latter, and (2) that the cancelled checks and invoices would inevitably have been discovered even if the Government had never made any use of the information gleaned from the usury records. Accordingly, the Government argues the evidence is admissible under both *Wong Sun* and *United States ex rel. Owens* v. *Twomey*, 508 F.2d 858, 865-66 (7th Cir. 1974).

III.

Inasmuch as the Government stipulated at trial that its criminal tax fraud investigation of the defendant resulted from and was an outgrowth of the disclosure of the illegally seized usury records, there can be no doubt that some sort of a causal nexus exists between the evidence produced by the investigation and the illegal seizure of Carsello's usury records by the Chicago police. However, it seems clear to us, if not the defendant, that the mere fact that the investigation would not have been undertaken but for the disclosure of the usury records does not necessarily compel the conclusion that all the evidence discovered in the course of the investigation is

therefore suppressible as "fruit of the poisonous tree." As the Supreme Court has most recently made clear,

> "Even in situations in which the exclusionary rule is plainly applicable, we have declined to adopt a 'per se or "but for" rule' that would make inadmissible any evidence, whether tangible or live-witness, which somehow came to light through a chain of causation that began with [illegal police action.]" *United States* v. *Ceccolini,* 98 S. Ct. 1054, 1060 (1978).

Thus, the question before us is not whether the evidence admitted against Carsello at trial would not have come to light but for the illegal action of the police, but rather

> "whether, granting the establishment of the primary illegality, the evidence . . . has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun* v. *United States,* 371 U.S. 471, 487-88 (1963).

This question, in turn, cannot be answered on the basis of "causation in the logical sense alone," but necessarily involves a weighing of the social costs of applying the exclusionary rule against the benefits to be gained therefrom, for the "penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve." *United States* v. *Ceccolini, supra,* at 1059, 1061-62; accord, *United States* v. *Calandra,* 414 U.S. 338, 349-354 (1974); *United States* v. *Paepke.* 550 F.2d 385, 388 (7th Cir. 1977). As Mr. Justice Powell explained in *Brown* v. *Illinois,* 422 U.S. 590, 609 (1975) (concurring opinion),

> "the notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost."

Thus, bearing in mind that the primary, if not exclusive, purpose of the exclusionary rule is to deter future police misconduct, *United States* v. *Calandra,* 414 U.S. 338, 347 (1974), we turn to the question whether the evidence admitted against Carsello at trial was come at by exploitation of the illegal seizure of his usury records or rather by means sufficiently unrelated as to purge the evidence of any taint resulting from the illegal police action.

IV.

In support of his 'fruit of the poisonous tree" argument, Carsello relies principally on the fact that the IRS agents used information gleaned from his usury records in the course of their tax fraud investigation. This, says Carsello, necessarily constitutes deliberate "exploitation" of the primary illegality and requires suppression of the cancelled checks and invoices admitted against him at trial because they were obtained through a chain of causation leading back to information revealed by the usury records.

We must agree with Carsello, of course, that in some sense of the word the Government did "exploit" the illegal action of the Chicago police by photocopying the usury records and using them as a source of leads during its tax fraud investigation. We cannot agree, however, that this "exploitation" led directly to any of the evidence actually used against the defendant at trial. After all, the usury records themselves were suppressed at trial, and none of the information appearing therein was related in any way to the activities of Grand Sanitation and Supply, Carsello's legitimate business enterprise. Indeed, the only link between the evidence at trial and the usury records was a notation of "Joe F." along with an accompanying address and telephone number both of which were out of date. Because of the investigating agent's initiative

and ingenuity, he was able to discover Joe Francone's current address from sources independent of the usury records and to interview him as a potential source of information concerning Carsello's lending activities. Much to the agent's chagrin, no doubt, Francone was unable to supply any information relevant to the agent's investigation of Carsello's failure to report interest income for, although Francone had asked for a loan, Carsello had not given him one. In the course of the otherwise unproductive interview, however, Francone revealed that he worked for Carsello at Grand Sanitation and Supply. The agent, who knew from IRS records that Grand Sanitation was owned by Carsello, then asked Francone to supply him with the names of some of Grand Sanitation's customers. Francone freely volunteered about 35 names. By chance, one of those customers happened to be the Brighton Construction Company, which was itself the subject of an unrelated IRS investigation at that time. From Brighton's cancelled checks, which were then in the hands of the IRS, the agent learned that Carsello had cashed checks made out to Grand Sanitation at two Chicago currency exchanges. With the cooperation of one of the currency exchange operators, the agent was able to obtain a list of about 35 more Grand Sanitation customers. Armed with the customer list, the agent then obtained the cancelled checks and invoices admitted against Carsello at trial from the customers themselves.

Given the rather tenuous link between the usury records and the evidence admitted at trial, we must agree with the district court's view that the discovery of the cancelled checks and invoices was sufficiently attenuated as to purge them of any taint associated with the illegal seizure of the usury records. There is simply no way that the Chicago police officers who seized Carsello's usury records or the federal agents who photocopied them could have foreseen

that they would prove useful in the course of a tax fraud investigation begun six months later into Carsello's legitimate business enterprise, as opposed to his usury activities. Moreover, we find significant as did the Court in *United States* v. *Ceccolini,* 98 S. Ct. 1054 (1978), that the evidence admitted at trial resulted from the voluntary disclosure of Grand Sanitation customers by Francone and the currency exchange operator, as well as the willing testimony of the customers themselves, which laid the proper foundation for admission of the cancelled checks and invoices into evidence. Like the testimony of the witness in *Ceccolini*, the voluntary cooperation and testimony of these parties could not have been anticipated at the time of the illegal seizure of Carsello's usury records and tends to dissipate the taint created thereby.[3]

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[3] Carsello seeks to distinguish *Ceccolini* on the ground that it involved the exclusion of a witness' testimony, as opposed to the suppression of physical evidence at issue here. We recognize, of course, that *Ceccolini* is not *controlling* here, and that attenuation analysis may properly focus on different factors when the alleged "fruit of the poisonous tree" is the testimony of a witness, as opposed to physical evidence. This is not to say, however, that the Court's reasoning in *Ceccolini* is totally inapposite in the circumstances of this case, where the physical evidence Carsello seeks to suppress was discovered as a result of information *voluntarily* supplied by a *third-party* to the investigation whose cooperation was not extracted by any police misconduct. Compare *Wong Sun* v. *United States*, 371 U.S. 471, 487-88, 491-92 (1963). To paraphrase *Ceccolini,* the degree of free will exercised by the informant is not irrelevant in determining whether the basic purpose of the exclusionary rule will be advanced by the suppression of the physical evidence ultimately obtained as a result of the informant's voluntary cooperation with the authorities. See 98 S.Ct. at 1060-61. At the very least the independent act of volition of the informant is a relevant "intervening circumstance" to be taken into account in the course of our attenuation analysis. Cf. *Brown* v. *Illinois*, 422 U.S. 590, 603-04 (1975).

In sum, we believe that the causal link between Carsello's usury records and the evidence admitted at trial was tenuous at best and sufficiently attenuated by intervening circumstances, including the voluntary cooperation of Francone, the currency exchange operator and Grand Sanitation customers themselves, as to permit the use of the cancelled checks and invoices at trial. Particularly when account is taken of the fact that the seizure of Carsello's usury records, though eventually ruled improper, was undertaken in good faith and pursuant to a warrant,[4] we fail to see how the deterrent purpose of the exclusionary rule would be materially served by its further application in the circumstances of this case. We believe that the suppression of the usury records themselves in both the state prosecution and the case at bar substantially effectuated the prophylactic purpose of the exclusionary rule, and that any additional deterrent value resulting from the further suppression of the cancelled checks and invoices at issue now would be de minimis and far outweighed, in our view, by the adverse impact on the administration of justice and our self-reporting system of taxation that would be occasioned by further extension of the exclusionary rule in the circumstances of this case. Accord, *United States* v. *Paepke,* 550 F.2d 385, 391 (7th Cir. 1977).

[4] As the district court observed in the course of its ruling on Carsello's motion to suppress, the Fourth Amendment violation involved here was not a flagrant one and resulted from a good faith error concerning the scope of a search authorized under cover of a warrant. The lack of flagrancy of the police misconduct and the good faith in which it was undertaken do, of course, bear directly on the degree of attenuation necessary to dissipate the taint resulting therefrom. *Brown* v. *Illinois,* 422 U.S. 590, 603-04, 609-12 (1975).

Accordingly, as we hold that the cancelled checks and invoices admitted against Carsello at trial were not suppressible as "fruit of the poisonous tree," we need not address the Government's alternative argument that the evidence was admissible under the "inevitable discovery" rule of *United States ex rel. Owens* v. *Twomey,* 508 F.2d 858, 865-66 (7th Cir. 1974).

The district court's judgment is

AFFIRMED.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Excerpt from our Brief Below

* * *

Sum and Substance

Recent cases construing *Wong Sun* support defendant's position that here, the evidence *was* "come at by exploitation" of the illegality. What's more, the cases relied upon by the government below, and upon which we expect they will be constrained to rely on review, are philosophically and functionally inapposite to *this* situation: a federal criminal prosecution, where "two sovereigns," the local and the federal governments, are involved. And finally, the two cases upon which the government and the court most heavily depended below (R. 42, 47) are *not* valid authoritative references.

* * *

The evidence *was* 'come at by exploitation' of the illegality.

A recent case from this Court is instructive to portray the lengths at which evidence may *appear* to be from illegality while still deemed "*tainted*" by illegal police conduct. In *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7 Cir. 1976), this Court reversed and remanded the District Court's denial of a State prisoner's petition for habeas corpus, holding he *was* entitled to a hearing on his allegations that evidence constituting the fruits of diverse police illegality was improperly used against him at trial. To assist district courts to determine whether evidence is suppressible as "fruit," or admissible as purged of taint, this Court stated:

> "[The prosecution] has the *opportunity* of showing that there was no taint, or circumstances which purge or dissipate it." *Id.* at 895, citing *Wong Sun, supra,* at 487-88 & 491 (Emphasis added.)

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* Footnote numbers and internal pagination cross-references have been changed for ease in reading from this excerpt.

Perhaps the Second Circuit said it best, suppressing:

> "[T]he road from the tap to the testimony may be long, but it is straight." *United States* v. *Tane,* 329 F. 2d 848, 853 (2 Cir. 1964).

In *United States* v. *Karathanos,* 531 F.2d 26, 34-35 (2 Cir. 1976), the Court jettisoned the notion that *Tane* failed to apply where, as here, officers "demonstrated" *good faith* by obtaining a warrant. " Our opinion [in *Tane*] . . . did not rest on the nature of the police officers' conduct, but rather on the closeness of the connection between the original illegality and the . . . [evidence sought to be suppressed]." *Id.* at 35, citing *Tane, supra,* 329 F.2d at 853.

* * *

From any realistic perspective, the challenged evidence used against defendant Carsello **was** *arrived at* **by exploitation** *of the original illegality;* and thus, defendant's Fourth Amendment rights were violated by its admission.

Philosophy and Function: The "balance" of the Fourth Amendment

or

What's left of it?

Two cases whose underpinning have been swept away founded the court's ruling below. This Court's decision in *United States* v. *Paepke*, 550 F.2d 385 (7 Cir. 1977), was based upon an unreported "case," *United States* v. *Scios,* .... F.2d ..... (D.C. Cir. 1976), No. 75-1619, August 23, 1976, which, in turn, rested its holding—no longer valid[1]

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[1] See p. App. 26, *infra*. *Scios* has been vacated (as of March 1, 1977), pending decision following rehearing *en banc*. In fairness to the government (which cited *Scios* below) and to this Court (which relied upon it as well), it should be noted that *Scios* was still viable in the D.C. Circuit at the time *Paepke* originally was decided.

Note added 7/26/78: See Addendum to Petition for Certiorari *supra,* pp. 17-21 thereof. *Scios* was reversed by the En Banc Court, as elaborated therein.

—upon a number of cases, the context of each of which renders it invalid as authority for a decision in *this* case.

Although *Scios,* and hence, to some extent *Paepke* as well, no longer may be regarded as authoritative, both the government and the court below heavily relied upon the doctrinal bulwarks of each of those cases: to wit, the Supreme Court's decisions in *Brown* v. *Illinois,* 422 U.S. 590 (1975), and *Michigan* v. *Tucker,* 417 U.S. 433 (1974), as well as several other decisions,[2] most notably, *Smith* v. *United States,* 324 F.2d 879 (D.C. Cir. 1963).

Smith v. *United States, supra,* is inapplicable for several strong and cogent reasons. First, and most importantly, there was no constitutional violation alleged in that case. Defendants there claimed that the testimony of an eyewitness should be suppressed, *solely* because police learned of his identity from defendants during a period of time when they were being illegally detained in violation of F.R.Cr.P. 5(a). Violation of Rule 5(a) is *not* equivalent to a constitutional violation, and evidence obtained from defendant during violation of the said Rule is suppressed pursuant to the Supreme Court's supervisory powers, *not* because suppression is mandated by any constitutional compulsion. See *Mallory* v. *United States,* 354 U.S. 449 (1957); *McNabb* v. *United States,* 318 U.S. 332 (1943). Hence there was not, as here, a claim that the evidence sought to be suppressed was obtained by virtue of a violation of defendant's **constitutional** *rights.*

Secondly, language in *Smith,* distinguishing between testimony of a "living witness" and evidence consisting of immutable documentary exhibits, demonstrates that *even*

[2] We expect to devote our Reply Brief at least in part to a discussion of such additional cases.

if (*arguably*) the legal principles set forth therein *appear* to apply (which, we submit, they do not, as above), *Smith* supports **our** position, favoring suppression here:

> "Here, no confessions or utterances of the appellants were used against them; tangible evidence obtained from appellants, such as the victim's watch, was suppressed along with the confessions. But a witness is *not* an inanimate object which like contraband narcotics, a pistol or stolen goods, 'speak for themselves.' *The proffer of a living witness is* **not** *to be mechanically equated with the proffer of* **inanimate** *evidentiary objects illegally seized.*" *Smith, supra,* 324 F.2d at 881. (Emphases added.)

The evidence allowed in *Smith* **was** testimony of a living witness, "an individual human personality whose attributes of will, perception, memory and volition interact to determine what testimony he will give." *Ibid.* **Here,** the evidence sought to be suppressed consisted **entirely** of "*inanimate object*[*s*] *which . . . 'speak for themselves.'*" *Ibid.* (Emphasis added.)

The "living witness" vs. "inanimate object" distinction moots an attempt to read *Smith* to support admitting the checks at bar.

So much for *Smith.*[3]

Brown v. *Illinois,* 422 U.S. 590 (1975), though in fact favoring our position, does not precisely apply; for there, the Court itself stated:

[3] It should be noted that although *Smith* was decided *after Wong Sun* v. *United States,* 371 U. S. 471 (1963), *Wong Sun* does *not* apply to the *Smith* fact situation which involves no allegation of any constitutional violation. Moreover, per *Smith,* 324 F.2d at 882, n.3, *Wong Sun* required suppression, *not* of "the testimony of an eyewitness to an event," but rather, of defendant's own statements and a package of narcotics.

> "We emphasize that our holding is a limited one. We decide *only* that the Illinois courts were in error in assuming that the Miranda warnings, by themselves, under Wong Sun always purge the taint of an illegal arrest." *Id.* at 605. (Emphasis added.)

Logically, we are somewhat at a loss to understand why the government below relied on this case; on its face, (by analogy) it supports our position, holding that after defendant's illegal arrest, his confession—even though preceded by *Miranda* warnings—absent any "intervening event of significance," *id.* at 604, sufficient to purge the taint of the initial illegality (the arrest), was inadmissible under *Wong Sun.*

Michigan v. *Tucker, supra,* is distinguishable. There, officers violated *Miranda* but followed the "letter of the law" existing prior thereto. 417 U.S. at 447. Although the Court held *Miranda* retroactively applicable to defendant's case, since the trial was held after *Miranda* was decided, it further held that the purposes of the exclusionary rule would not be served by suppression of the testimony of a witness who refuted defendant's alibi, where defendant had made a voluntary statement to police including said alibi and naming the said witness. It should be noted that defendant's *own* statements *were* suppressed; **only** the *testimony of the witness* whose identity was learned during questioning of defendant *was held admissible. Id.* at 447-48.

Militating in favor of admissibility of the said "live witness" testimony was that the police complied with the law as it existed at the time—clearly *not* true at bar:

> "We consider it significant to our decision in this case that the officers' failure to advise respondent of his right to appointed counsel occurred prior to the

> decision in Miranda. Although we have been urged to resolve the broad question of whether evidence derived from statements taken in violation of the Miranda rules must be excluded regardless of when the interrogation took place, we instead place our holding on a narrower ground. For at the time respondent was questioned these police officers were guided, quite rightly, by the principles established in Escobedo v. Illinois [citation omitted] [which principles they followed]." *Id.* at 447.

Another telling distinction between *Tucker* and the case at bar is that in *Tucker,* principles applicable *only* to the Fifth Amendment and having no place in a discussion of Fourth Amendment rights played a significant part in the Court's decision to admit the testimony of a live witness other than the defendant. See *id.* at 447-50.

* * *

Scios, supra, is materially distinguishable on one vital and crucial ground: *what we sought to suppress is evidence consisting entirely of immutable, tangible physical objects, not the testimony of a living witness.*[4]

To the extent that *Scios* and its doctrinal predecessors may be said to stand for the proposition that the exclusionary rule is to be applied on a sliding scale, with the degree of attenuation obviating the need for exclusion of evidence arrived at by assessing the *degree of odiousness of the unconstitutional methods* used by its procurers, then the improper and illegal official conduct in the case at bar, perceived in its totality, reeks sufficiently of official bad faith, on the whole, to require exclusion of *this* evidence.

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[4] See discussion of *Smith* v. *United States,* 324 F.2d 879 (D.C. Cir. 1963, at pp. App. 14-15, *supra,* and see *id.* at 881-82.

To Paraphrase: *On a sliding skunk scale, the nose knows.*[5]

The judicial approach to "deterrence" of illegal police conduct as expressed in such cases as *Scios* and *Paepke*,[6] *supra*, threatens to undermine what we had thought was rubbed out—the "silver platter" doctrine, whereby one sovereign effectively can wash its hands of the illegal gloss placed on evidence by officers of another.

And to the extent that official conduct is viewed as "deterrable" only if the fortuitous consequences of illegal conduct are *foreseeable* by the officers, such a doctrine encourages sur-repititious blinder-wearing.

* * *

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[5] Q. When ain't a taint, a taint?
A. When the meter reader hodes his nodes.
[Apologies here and hereafter, Lewis Carroll.]

[6] Specifically, *Paekpe* relied on *Scios*, and it is mainly *Scios* which we distinguish in the immediately following discussion.

In addition to this Court's inadvertent mis-reliance on *Scios*, see fn. 1, p. App. 13, *supra*, *Paepke* is further distinguishable for the factual reason that in *Paepke*, the California authorities at the outset of the search and seizure had no idea that a criminal tax prosecution might result. On the contrary, at bar, the very fact that the Chicago police seized the records—not "incriminating" as were the narcotics and money in *Paepke*—and turned them over to federal authorities demonstrates that a federal prosecution was at least hoped for, if not actually *"foreseen."* . . . *The seizure itself "foresaw" a federal prosecution.*

Paepke's act of *free will* in filing the false returns as to illegitimate income sources (see *Paepke*, 550 F.2d at 390-91) has no counterpart here, where the alleged false returns were false (if at all) *only* for the failure to report various items of income from *legitimate* sources. Thus, the *post-seizure*, "free will" aspect of *Paepke* **has no parallel** *at bar*.

Note added 7/26/78: *Scios* has been reversed. See *Addendum*, pp. 17-21 of this Petition for Certiorari.

The "immutable object which speaks for itself" vs. the living witness whose testimony depends upon free will.

The classical distinction between "future live testimony" and "tangible evidence"[7] is a material distinction sufficient in itself to remove *this* case from the aegis of *Scios*. See Part II(A) of *Scios*, sl. op. pp. 5-6. Here, there is **no** *intervening act of* **free will** of a witness which can be said to be a significant intervening act for attenuation purposes. See *Brown* v. *Illinois*, 422 U.S. 590, 604 (1975); *United States* v. *Smith*, *supra*.

> "[T]he taint of an illegal seizure can be purged, and 'exploitation' thereby avoided, if the evidence in question is obtained only after intervening circumstances, such as an act of volition by the witness." *Scios*, sl. op. at 12.

Even in *Scios'* discussio' of attenuation as gauged by the sliding skunk scale, the live testimony vs. tangible object distinction consistently is recognized, with the witness' volition receiving great weight as an exploiter-avoider. See *id.* at 10, 12-15.

To Paraphrase: **The** *res* **which** *ipsa loquitor* **weighs less than live, free will.**

In *Paepke*, *supra*, the *defendant's act of free will* in filing a false return *after* he *knew* the authorities possessed the money seized in California serves further to distinguish *Paepke* from the instant situation. Here, of course, the returns on the basis of which defendant was convicted were *ex post facto*, already filed, at the time the "locals" conducted the odious search. Thus this case, unlike *Paepke*, is **not** one where the defendant "had a choice which prevents this type of prosecution from being predict-

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[7] Existing statements, unlike future testimony, are categorized by *Scios* on the same footing as tangible evidence. Accord, *Smith's* commentary on *Wong Sun*; see fn. 3, p. App. 15, *supra*.

able." 550 F. 2d at 392. *Paepke,* of course, *had* committed such *affirmative acts* as requesting a refund from IRS *after* the seizure.[8]

There *is* no parallel at bar.

The evidence at issue, being tangible, *in esse,* can't lose the taint of which it reeks by anyone's "volition."

A taint by any name, stink'th.†

Scios' the Limit

To the extent that *Scios'* holding—that there *was* sufficient purging of the permeated taint to make the testimony "pure" and hence admissible—hangs on the evidence's being "future testimony of a living witness," **the balance of *Scios* doesn't hold water** and won't support the holding here.

Likewise, *Paepke's* holding—that defendant's affirmative conduct vis-á-vis the offenses[9] rendered the prosecu-

[8] See fn. 9, *infra.*

† Apologies, as ever, William Shakespeare, 'midst the freely "adapted."

[9] Briefly: In October 1971, Paepke, of Wisconsin, was arrested in San Francisco for violation of the California narcotics laws and $12,725 was seized from him. The California court determined that the search and seizure were unconstitutional, and the evidence was ordered suppressed. Still, the money was turned over to the IRS. Paepke returned to Wisconsin.

The IRS terminated Paepke's tax year in October, 1971, assessed a deficiency of approximately $26,000 and levied upon the funds seized. In December, 1971, Paepke filed in the United States Tax Court, seeking to have the money returned to him. The suit was dismissed on jurisdictional grounds.

Subsequently, Paepke filed an individual tax return for the taxable year ending December 31, 1971, claiming an adjusted gross income of $3,275, owing the government $234 and claiming a refund of $12,491 because of the money seized in October, 1971. A criminal tax investigation ensued, and conviction followed.

tion less than "*foreseeable*"[10] to the seizers so that no deterrent purpose could properly be served by excluding the evidence—has no force here.

Carsello and Paepke
Harmonized

Crucial factual differences between this case and *Paepke* serve to allow this Court to reverse *this* cause while adhering to *Paepke's* principles. In addition to the variances already noted, the telling factor featured in Judge Tone's striking accord—the *ex post facto* criminal conduct of the defendant (juxtaposed to **our** case, where *any* criminality of which defendant stands convicted occurred **prior** to the search)—permits Your Honors to reverse Carsello's conviction without wavering from the convictions voiced in *Paepke.* See *Paepke, supra,* 550 F.2d at 394.

* * *

The unconstitutional official conduct here was sufficiently "bad" to render the exclusionary rule appropriate for deterrent purposes.

Scios and *Paepke* both deal with the "balancing test" of determining whether courts must exclude evidence resulting from unconstitutional official conduct in violation of the Fourth Amendment. Using this approach, courts must *balance* the *value* of the deterrent purpose of excluding the evidence *against* the *cost* of excluding reliable, relevant evidence, which, in turn, sometimes prevents the "truth" from surfacing. See *Scios,* sl. op. at 8-11; *Paepke,* 550 F.2d at 388-90, 392-93.

In *Scios,* the court found that the official conduct was "a marginal case of law enforcement misconduct," *id.* at 13,

[10] See fn. 6, p. App. 18, *supra.*

19-20, partly because the file folder at issue (containing information which led to the challenged prospective testimony) bore the name of the business, an illegal wiretap of which was the reason for the investigation.[11]

Here, of course, the records seized were **completely** *unrelated to* the target of the investigation, *gambling*.

In fact, what the local officers did here was to conduct a broad, general search, *under* **cover** of a warrant. **Assuming**, *arguendo*, that the warrant was procured in good faith, **still** the officers' conduct in seizing material neither covered by the warrant nor "outwardly incriminating"[12] was no better than a fishing expedition. Finding nothing called for by the warrant, and nothing coming to their attention which *appeared* to be illegal or contraband, the officers were *way* out of line when they seized defendant's private personal papers out of his home under the protective guise of the warrant.

Here, the local officers' conduct **should** *be deterred*. Taking a man's private papers from his home under these circumstances is odious enough to ring the bell on the moveable muck-meter; to make the "exclude it" sign light up. The *Scios* court found the FBI's conduct "hardly to be censored. [*sic.*]" Sl. op. at 19.

Even if this Court, here and now, holds that the conduct of *all* the federal agencies was proper, **admitting** *the evidence* **condones** *the conduct of the* **locals.**

* * *

[11] Scios, a private detective, was charged with illegally having intercepted wire communications of said business. Note added 7/26/78: *Scios* has since been reversed. See *Addendum, supra.*

[12] See *United States* v. *Gray*, 484 F.2d 352 (6 Cir. 1973); see *Preface* to certiorari petition, pp. 7-8, *supra.*

In contemplating the deterrent effect of excluding illegally obtained evidence, Your Honors must think about deterring, not only the federal authorities, but also, the *local* police.

Allowing this evidence to be used against defendant upon these facts gives *carte blanche* to locals to get a facially valid search warrant, seize everything in sight when executing it (even if there is nothing in [or out] of sight even vaguely resembling what the warrant listed or anything else "outwardly incriminating"); and *then*, though a court ordered all defendant's purely personal papers returned to him, *the locals can get away with* presenting **the whole pile** to federal authorities[13] in hopes something incriminating just might turn up.

What? A spot on the silver platter we thought was all rubbed out?

Permitting the use in the case against defendant Carsello of tangible evidence consisting of checks found by federal authorities as a direct result of the seizure of defendant's private papers by local police does, in practical effect and application, resurrect the silver platter doctrine in multi-sovereign attenuation cases. While little has been said about the local-federal interaction thus far, it can hardly be doubted that *this evidence would be suppressed if* **all** *the activity* (search and seizure through and including investigation, evidence procurement, and use in court) *had been carried out by arms of a single sovereign.* Al-

[13] In *Paepke*, of course, the "locals" could not have contemplated, let alone foreseen, what would ensue; hence, *there*, there *was* no local conduct ripe for federal exclusionary deterrence. *Here* there **is.**

though the district court found that the government's action in subpoenaeing the records after their illegal seizure by locals was not improper in and of itself, the court quite properly has ruled the immediately-seized evidence inadmissible.

The difficulty, it appears, *lies in perceiving the* **identity** *of the class* whose future illegal conduct is *to be deterred.*

Here, now, the local authorities must be the target. And to the extent that the otherwise blameless federal authorities capitalized on ("exploited") the local officers' illegality, the federales become accountable for the locals' conduct —just as the government would argue, in a criminal trial, that a defendant's guilt is based on accountability.

If the fact that the local officers here procured a facially valid warrant before conducting a fishing expedition search can insulate their conduct from the sanction of excluding from a man's federal trial all evidence resulting from their unconstitutional seizure of his private papers, **then** the warrant requirement of the Fourth Amendment is *worse than meaningless;* it is the tool, no, the *deus ex machina* by incredible virtue of which the otherwise inadmissible evidence becomes purified.

Had gambling records (as called for by the warrant) been found during the raid, and had the private papers been taken at the same time, perhaps a strong argument could be made that the local officers were acting in that kind of good faith which obviates the need for exclusion for deterrent purposes. See *Scios,* sl. op. p. 19-22. But here, where nothing either called for by the warrant or facially incriminating was found, the seizer's conduct in procuring personal papers after a sweeping search is suffi-

ciently toxic to slide the needle on the slipping poison-pointer beyond the line which says, "exclude." ††

A final word about the "balancing approach" to the exclusionary rule and the Fourth Amendment. *None* of the cases from the Supreme Court upon which the *Scios* court relies in articulating and applying this test *was a direct appeal from a criminal conviction.* See *United States* v. *Ceccolini,* 542 F.2d 136, 142 n.11 (2 Cir. 1976), *cert. granted,* May 2, 1977, ... U.S. .....

The Supreme Court has yet to speak in such a case on the issue whether police conduct at the fringes of the cloak of illegality must result in exclusion of evidence or whether, to require exclusion, the law must be rent right down the spine.[14]

In *Ceccolini,* the government argued for a balancing test (see *id.* at 141; the "conduct was hardly purposeful or flagrant") and the court simply ignored it. Certiorari having been granted therein, it is to be anticipated that *Ceccolini* will provide the **vehicle** for the Court's extension

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†† Assume:
DO = Degree of Odiousness
DA = Degree of Attenuation
X = Exclude!
DPUC = Degree of Procurer's Unconstitutional Conduct

* * *

Whenever DO is greater than DA, there is some DPUC. If there is any DPUC, it reeks.
THEREFORE: EXCLUDE whenever DO is greater than DA
Or, **To Formulize:**
X = The Difference between DO and DA, *or*
X = DO minus DA

[14] *This* is *not* like the situation in *Michigan* v. *Tucker,* 417 U.S. 433 (1974), where the seizers in fact followed the law as it then existed.

of or limitation of a balancing approach in applying the Fourth Amendment's exclusionary rule to federal criminal trials.

Scios is no longer law.*

Both in the court below and here, we have discussed *Scios* as if it were the law, particularly because this Court in *Paepke* largely relied upon the "logic" of *Scios*. And indeed, until we received official confirmation to the contrary, we had to assume that it was.

As of March 1, 1977, the *Scios* decision no longer existed, although the government, defense counsel, and the court below treated it as the law at all times until *after* defendant's conviction herein. (See R. 42, 47) On March 1, 1977, an order entered by the District of Columbia Court of Appeals (see App. 4) granted rehearing *en banc* and vacated the opinion and judgment theretofore filed.

To the extent that *Paepke* relied upon *Scios, Paepke* is that much less viable.

And to the extent that *both* those decisions relied upon the underlying principles just discussed, **see** *supra,* they're living proof **(old saw)** that **a chain is only as strong as its weakest link.**

The court below adhered to its decision to convict defendant even after it learned that *Scios* no longer was law even in its own Circuit. To stick to the *Scios* rationale even after *Scios* itself was vacated requires careful attention to *Scios'* doctrinaire. We submit that even the slippery basis of the sliding scale of *Scios,* as formulized above, requires that the evidence here attacked be suppressed.

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* *Note added 7/26/78:* See *Addendum,* pp. 17-21 of Petition for Certiorari and see n. 1, p. App. 13, *supra. Scios* has since (on July 21, 1978) been reversed En Banc.

Penultimatum

The government below referred to its fortuitous finding of *Scios* as serendipity.[15] In the afterlight of all the foregoing, we can only predict: *this* **serendipity**, *too, shall come to pass* **as serendipity-doo-dah.**[16]

CONCLUSION

Government exhibits 1 through 56—a series of checks, without which there was insufficient proof to sustain the charges in Counts 2, 3 and 4, of which defendant stands convicted—should have been suppressed. Their admission into evidence violated defendant's Fourth Amendment rights. The conviction should therefore be reversed.

Respectfully submitted,

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[15] *Cf. United States* v. *Bacall,* 443 F.2d 1050, 1057 (9 Cir. 1971), referring to "serendipity" discovery of evidence by officials.

[16] *Apologies* to (*inter alia*) Walt Disney.